

# Contents

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## CREEPING LEGITIMACY OF CORPORATE SOCIAL RESPONSIBILITY

The concept of corporate social responsibility (CSR) has been with us for a while, but there is no fixed definition of it so far. It represents from a restrictive notion to an expansive one depending on its author's viewpoint. There was a time when CSR would have proved an illusory idea in the philosophy of the likes of Milton Friedman who said half a century ago: "There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engage in open and free competition, without deception or fraud."<sup>1</sup>

Times have now changed over the last few decades and especially in the recent tide of globalization businesses have become more aware of their responsibilities beyond making money. Although CSR is considered in some quarters as a business cost or burden, there seems to be stronger support in the corporate world for the view that CSR may prove a business opportunity as well as a business strategy over a long term as opposed to the short-term profit maximization. There has also been noticed lately a growing competition amongst firms in CSR related activities and production of glossy reports on them, which also play a significant role in image building and PR relations.

Whatever might be the real intention behind CSR publicity stunts, it is an undeniable fact that the underlying current of corporate culture tends to embrace CSR as an essential element of modern corporate governance despite the contrary views of the neo-Friedmanites. This is from the realisation that CSR gives corporations some legitimacy to operate in the society in which they do in the sense that they reap benefit there in exchange for some return to the society which should not be looked at as charity or philanthropy rather as consideration for social contract.

CSR is not just an off-hours job, rather it is business responsibility based on ethics. This is perhaps meant when one commentator stated: "But the gulf oil spill and the financial crisis have taught us, rather brutally, that the heart of the relationship between business and society doesn't lie with the charitable deeds that companies do in their off-hours but whether they are doing their day jobs in ways that help or hurt — the rest of us."<sup>2</sup> Thus, CSR should be considered in the spirit of genuine co-operation between the corporation and the society and not just as corporate

<sup>1</sup> Milton Friedman, *Capitalism & Freedom* (1962), p.133.

<sup>2</sup> Chrystia Freeland, "What's BP's social responsibility?" *The Washington Post* (Sunday, July 18, 2010), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071604070.html?hpid=opinion:nsbox1>

### Articles

A question of religion or orientation? *Hall & Preddy v Bull* and the possible effect of the Equality Act 2010 3

Warning: exchange of commercially sensitive information between competitors may result in an infringement of Article 101 TFEU by object 6

**Institute News 10**

### Articles (cont'd)

Justice? Whose justice? Punishment, mediation or reconciliation? 10

### Articles (cont'd)

OLAF – a view from inside: A typology of investigative cultures 17

Rules governing the share capital of German companies 20

greenwashing as it turned out to be case in the latest BP oil disaster.

Now the question is not whether CSR is a reality, rather what it contains and how it can be enforced. CSR is an evolving concept and the future will take care of it. In recent years NGOs and various other stakeholders have strongly protested corporate ill deeds all over the globe that have promoted corruption or affected human rights, social and labour rights, the environment, the global climate and the prospect of sustainable development. These have emerged as the prominent aspects of CSR so far. The final report (March 2011) of the UN Secretary General's Special Representative (UN SGSR) on the guiding principles on business and human rights for the implementation of the UN "protect, respect and remedy" framework also cautiously attributes the meaning of "human rights" to internationally recognised human rights. If a corporation, however, for its own goodwill or reputation wants to stretch beyond these normative standards to widen the scope of CSR, for instance, by including the notion of human dignity, it is completely up to it and it may do so on a case by case basis.

The world's patience for voluntarism for CSR seems to have waned over time, and there is a renewed call for accountability for corporate behaviour that concerns the triple bottom line of people, profit and planet. Where there is moral conviction there may be need for little law, but where there is little moral conviction ample law may not even come to be of much use often. Corporations may get their way through "creative compliance" or "creative avoidance" of law, ie by manipulating law in a way that technically shows no breach of it. So, the more important thing is the moral attitude or conscience. The more a corporation conforms to it, the better it is for the world!

Although there is no binding international regulatory framework for CSR so far, there appears to be in recent years a process of creeping legitimacy of CSR in different forms and shapes in the horizon. Four such trends may be identified:

First, there appears to be increasing shareholder activism which underpins corporate investment in a socially responsible manner. Socially responsible investment (SRI) is now a growing movement across the globe which could be boon for CSR. Corporations may be legally accountable when they say they have confirmed SRI but, in fact, have not done so.

Second, CSR may be fostered by indirect regulation where a company is required to disclose information about its social, environmental and ethical considerations in its decision making. The United Kingdom, Belgium, Australia, Germany and the European Union have followed this route and made it a statutory requirement. Such requirement of corporate disclosure will be increasingly stressed to tackle climate change issues in the years ahead.

Third, although corporations may make voluntary commitments to CSR they may be taken to task legally. Nike has had this experience lately. Nike was sued for the violation of California's legislation on unfair competition and false advertising when it falsely claimed in its CSR reports (ie faux CSR) that its suppliers had abstained from sweated labour. The suit resulted in an out-of-court settlement though.

Fourth, the most important development in recent years for the fostering of CSR is found in the information super highway. The wider use of internet globally in various forms has proved a great cause for concern to corporations about their reputation and consequently their status and business future. This single phenomenon has constantly alerted them to be cautious. Corruption breeds in the dark, but when the information of the ill-doing is in the

public gaze it cannot go far: "sunshine is the best antiseptic."

The UN SGSR in his guiding principles affirms the traditional position of international law by stressing the corporate responsibility to respect human rights as against the state duty to protect. He has thus invented wheels for CSR in a way where its legitimacy could be ensured by requiring business enterprises to respect human rights in certain specific manners including by exercising human rights due diligence. This means that if business enterprises fail to respect human rights somehow against their promise to do so (for their reputation or good will), they can be taken to task. Hence the creeping legitimacy of the requirement kicks in!

It seems corporate culture has not yet developed to the extent of accepting legally binding CSR when the concept itself is a fluid one, and it may still be some way off. However, there may be common core principles in the voluntary corporate codes of conduct and in other relevant sources that can be culled as CSR principles and endorsed as legally binding over time. Until that happens innovative ways are to be found to legally enforce voluntary principles when corporations' conscience lapses.

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## Articles for Amicus Curiae

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